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**IN THE
COURT OF APPEALS OF INDIANA**

HEATHER (PARMETER) SCOTT,)
)
 Appellant,)
)
 vs.) No. 09A02-0802-CV-181
)
 SHONN PARMETER,)
)
 Appellee.)

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Thomas Perrone, Judge
Cause No. 09D01-0409-DR-84

June 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Heather (Parmeter) Scott (“Mother”) appeals from the trial court’s denial of her motion to correct error following the court’s final custody order. Mother presents three issues for our review, which we consolidate and restate as whether the trial court abused its discretion when it granted provisional custody to Shonn Parmeter (“Father”). Father cross-appeals and asks this court to award him appellate attorney’s fees.

We dismiss and remand with instructions.

FACTS AND PROCEDURAL HISTORY

While Mother was married to Father, she gave birth to twin children, a son and a daughter. Sometime after the children were born in 2003, Mother and Father separated, and, in 2005, dissolution proceedings were initiated. The dissolution court entered a provisional order that the parties share joint custody of the children.

On June 7, 2006, the Cass County Department of Child Services (“DCS”) investigated a report that naked photographs had been taken of son. As a result of that investigation, DCS filed petitions for authorization to file petitions alleging son and daughter to be CHINS, and the Cass Circuit Court (“Circuit Court”) ordered that the children be placed with Father immediately. On November 28, 2006, the Circuit Court entered its order finding the children to be CHINS. After a review hearing on December 4, 2006, the Circuit Court continued the children’s placement with Father. On February 22, 2007, Mother filed her motion to reverse or set aside the CHINS finding. And on April 11, 2007, the Circuit Court terminated the wardship of the children.

In the meantime, on September 26, 2006, the dissolution court entered an Order Regarding Custody, which provided:

Custody of the children . . . has been determined by [the] Circuit Court to be with [Father]. In the event that order ends, it is the order of this Court that the existing custody and parenting time as determined by [the] Circuit Court will remain in effect until a custody hearing can be held in this Court.

Appellant's App. at 42. After the wardship was terminated, Mother filed a Petition for Return to Prior Order and for Immediate/Expedited Hearing. In that petition, Mother alleged that the dissolution court should return custody of the children to her pending a final custody hearing.¹ The dissolution court denied that petition and ordered Father to retain custody of the children until the final hearing.

After the final custody hearing, the dissolution court awarded "legal and physical custody" of the children to Father. And the dissolution court ordered that Mother would have parenting time with the children. Mother filed a motion to correct error, which was deemed denied. This appeal ensued.

DISCUSSION AND DECISION

Mother contends that the dissolution court abused its discretion when it ordered Father to retain custody of the children after the wardship was terminated and before the final custody hearing. Mother maintains that the dissolution court should have granted her petitions for psychological evaluations for the children "before modifying the provisional order" and should have held a hearing on temporary custody. Brief of Appellant at 19. But we do not reach any of the issues Mother raises on appeal, because they are moot.²

¹ In her brief, Mother alternately alleges that a provisional order gave her primary custody of the children and that the parties shared joint custody provisionally. Mother does not direct us to any court order to support her contention that she had primary custody.

² Mother's argument on the issue of the requested psychological evaluations expressly states that those pertain only to the issue of provisional custody, not the final custody determination.

In Stratton v. Stratton, 834 N.E.2d 1146, 1149 (Ind. Ct. App. 2005), this court held that once a final custody determination has been made in a dissolution case, issues regarding a dissolution court's determination of temporary custody are moot. As we observed in Stratton, because the period of temporary custody has passed and a final determination has been made, we cannot render effective relief. Mother does not appeal from the dissolution court's final custody determination. As such, Mother does not present us with any issues to address on appeal, and we dismiss her appeal under the mootness doctrine.

Cross-Appeal

Father contends that he is entitled to appellate attorney's fees under Indiana Appellate Rule 66(E). In Boczar v. Meridian Street Foundation, 749 N.E.2d 87, 94-95 (Ind. Ct. App. 2001), we discussed appellate attorney's fees:

Our supreme court has cautioned Indiana appellate courts concerning the award of appellate attorney fees:

[I]n exercising its discretionary power to award damages on appeal, an appellate tribunal must use extreme restraint. Notwithstanding the harmful delay occasioned by crowded judicial dockets and limited resources, we cannot fail to recognize that the imposition of punitive sanctions does have significant negative consequences. It may punish, and will deter, the proper exercise of a lawyer's professional responsibility to argue for modification or reversal of existing law. It will have a chilling effect upon the exercise of the right to appeal. It will discourage innovation and inhibit the opportunity for periodic reevaluation of controlling precedent.

Orr v. Turco Mfg. Co., 512 N.E.2d 151, 152 (Ind. 1987) (applying the now superseded App.R. 15(G)). Hence, the discretion to award attorney fees under App.R. 66(C) is limited to instances "when an appeal is permeated with meritlessness, bad faith, frivolity, harassment, vexatiousness, or purpose of delay." See id.

* * *

To prevail on a substantive bad faith claim, the party must show that the “appellant’s contentions and argument are utterly devoid of all plausibility.” Orr, 512 N.E.2d at 153; 22 Stephen E. Arthur & Jerome L. Withered, *Indiana Practice: Civil Trial Practice* § 38.20, at 455 (1996).

(Emphasis added).

Here, as we have held, the issues Mother presents on appeal are moot. And our opinion in Stratton, which was handed down in 2005, makes it clear that the issues are moot. Mother does not acknowledge Stratton, and Mother does not ask this court to reconsider its holding therein. Indeed, Mother has not filed a reply brief to address mootness, which Father raised in his brief on appeal.

Further, Mother refers to the dissolution court having awarded her primary physical custody in a provisional order, but Mother has not provided us with any order issued by the dissolution court to that effect. Father contends that Mother has misstated the facts on this issue, and our review of the record does not reveal any direct evidence that Mother was granted primary custody.³

Finally, in her brief on appeal, Mother accuses the dissolution court of “favoritism” towards Father and “unfair treatment” towards her. See Brief of Appellant at 9, 14. And Mother suggests that the dissolution court made “illegitimate inferences” to support its provisional custody order. See id. at 14. “Lawyers are completely free to criticize the decisions of judges. However, as licensed professionals, they are not free to make recklessly false claims about a judge’s integrity.” In re Wilkins, 782 N.E.2d 985, 986 (Ind. 2003), cert. denied, 540 U.S. 813 (2003). By alleging that the dissolution

³ Mother cites to portions of the record suggesting that she had primary custody, but there is no order from the dissolution court in support of that contention.

court's decision was based on the judge's personal feelings about Mother, Mother's counsel impugns the judge's integrity. See Lasater v. Lasater, 809 N.E.2d 380, 403 (Ind. Ct. App. 2004).

Given that Mother's claims on appeal are moot, they are "utterly devoid of all plausibility." Had Mother's counsel performed a modicum of legal research on the issues appealed, she would have found our decision in Stratton. Regardless, Father cites to Stratton in his brief, and Mother did not file a reply brief to address the issue of mootness. In addition, Mother's repeated reference to the dissolution court's provisional order granting her primary custody, without providing an order from that court to that effect, is problematic. And we will not tolerate the disrespect for the dissolution court Mother shows throughout her brief on appeal. For these reasons, we hold that Father is entitled to appellate attorney's fees under Indiana Appellate Rule 66(E). We also hold that Mother's attorney, not Mother, shall be chargeable with Father's appellate attorney's fees.⁴ Mother should not be held responsible for her attorney's pursuit of this meritless appeal. We remand to the dissolution court for a hearing to determine the amount of appellate attorney's fees owed to Father.

Dismissed and remanded with instructions.

DARDEN, J., and BROWN, J., concur.

⁴ Mother's attorney recently represented Mother in her appeal from the CHINS determination regarding the children. See Parmeter v. Cass County Dept. of Child Services, 878 N.E.2d 444 (Ind. Ct. App. 2007). In that case, Mother's attorney showed poor judgment in deciding which issues to present on appeal, and we found issues waived for failure to follow the appellate rules with regard to citing authority and citing to the record.